

FILED BY CLERK

JUN -4 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

CLAUDIO NAVA TAPIA, a single man,	)	2 CA-CV 2012-0164
	)	DEPARTMENT A
Plaintiff/Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
TERRI L. FETTERS, a married woman	)	Appellate Procedure
dealing with her sole and separate property,	)	
	)	
Defendant/Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201000573

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

Cooper & Rueter, L.L.P.  
By Stephen R. Cooper

Casa Grande  
Attorneys for Plaintiff/Appellee

Tysman Law Firm, P.L.C.  
By Kissandra L. Tysman

Mesa  
Attorneys for Defendant/Appellant

H O W A R D, Chief Judge.

¶1 In this real property dispute arising out of foreclosure, appellant Terri Fetters appeals from the trial court's order granting summary judgment against her and

awarding a deficiency judgment and attorney fees in favor of appellee Claudio Nava Tapia. Fetters claims a genuine issue of material fact existed and maintains the court erred in awarding attorney fees and in determining the fair market value of the property. Because the court did not err, we affirm.

### **Factual and Procedural Background**

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in her favor.<sup>1</sup> *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). Fetters purchased a parcel of property in the City of Maricopa from Claudio Nava Tapia. Fetters executed a promissory note for the balance of the purchase price, secured by a deed of trust with Nava as beneficiary and Stewart Title & Trust of Phoenix (“Stewart”) as trustee. In October 2009, Stewart recorded a notice of trustee’s sale of the property based on Fetters’s alleged default in payment on the promissory note. In January 2010, Stewart conducted a trustee’s sale of the property and sold the property to Nava.

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<sup>1</sup>Our record on appeal is incomplete and does not contain any filings before Fetters’s August 2011 response to a statement of facts in support of summary judgment. To provide context, we therefore reiterate pertinent facts from our prior memorandum decision, which reviewed the grant of summary judgment against Fetters on her claim against the trustee who conducted the sale of the property at issue. *See Fetters v. Stewart Title & Trust of Phx., Inc.*, No. 2 CA-CV 2011-0126, ¶¶ 2-4 (memorandum decision filed Apr. 17, 2012); *see also Parker v. McNeill*, 214 Ariz. 495, n.5, 154 P.3d 1041, 1044 n.5 (App. 2007) (court of appeals may “take judicial notice of records and other appellate proceedings in the same case”), *quoting State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 590 n.1, 845 P.2d 513, 516 n.1 (App. 1992).

¶3 Nava sued Fetters demanding payment of the promissory note balance. Fetters filed a six-count counterclaim against Nava. Nava moved for summary judgment on counts one through three of Fetters’s counterclaims, which “the parties conceded . . . applied to Count Six as well.” The court granted Nava’s motion for summary judgment on counts one, two, three, and six, and dismissed those counterclaims.

¶4 Nava then moved for summary judgment on his complaint and counts four and five of Fetters’s counterclaim. After oral argument, the trial court granted summary judgment for Nava on the liability portion of his claim and against Fetters on counts four and five of her counterclaim. It left the issue of Nava’s damages for another hearing. After the damages hearing, the court found the fair market value of the property to be \$1,000,000 and entered a deficiency judgment against Fetters in the amount of \$873,146.74. Fetters appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

### **Summary Judgment**

¶5 Fetters first argues the trial court erred by granting summary judgment in favor of Nava on count six of her counterclaim. “On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law.”<sup>2</sup> *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

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<sup>2</sup>Our record on appeal does not contain the motions, transcripts, or rulings that led to the dismissal of any counts other than counts four and five of Fetters’s counterclaim.

¶6 Fetters argues the trial court erred because count six was not part of the original motion for summary judgment, the parties were not able to prepare or argue the merits of that count, the court’s findings of fact do not address the count, and the pleaded facts supported proceeding to a jury trial. But she did not object below to the court’s judgment dismissing count six on these grounds and has therefore waived them. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 6, 119 P.3d 467, 470-71 (App. 2005) (objection on one ground does not preserve another for appeal).

¶7 Moreover, the minute entry of the hearing that led to the judgment states, without further explanation, that Nava was “seeking to have Counts 1, 2, 3, [and] 6 . . . dismissed from the Counterclaim” and, in its under advisement ruling, the court further noted “the parties conceded the motion applied to Count Six” and granted the motion in its entirety. Fetters has not provided a transcript of that hearing, and we therefore presume it supports the trial court’s ruling. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (“A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal.”). Therefore, Fetters has not shown the trial court erred in granting judgment on count six.

### **Attorney Fees**

¶8 Fetters next argues the trial court abused its discretion in awarding Nava attorney fees under A.R.S. § 12-341.01. “An award of attorney fees is left to the sound

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However, we may take judicial notice of our record from the previous appeal in this case. *See Parker*, 214 Ariz. 495, n.5, 154 P.3d at 1044 n.5.

discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.” *Orfaly v. Tucson Symphony Soc’y*, 209 Ariz. 260, ¶ 18, 99 P.3d 1030, 1035 (App. 2004). If there is any reasonable basis to support the award, we will not disturb it. *See Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, ¶ 20, 961 P.2d 1059, 1065 (App. 1998).

¶9 Section 12-341.01 allows the court to award “reasonable attorney fees” to the successful party in an action arising out of contract. A party challenging fees awarded under the statute as excessive must state with particularity in what way the fees are unreasonably high; a mere allegation of excessiveness is insufficient. *Ponderosa Plaza v. Siplast*, 181 Ariz. 128, 133, 888 P.2d 1315, 1320 (App. 1993).

¶10 Fetters argues the fees the court awarded were unreasonable because they were the result of “unjustified overbilling” that included charging Nava for work done for another client or billing Nava twice for the same work. However, Fetters did not object to the request for fees in the trial court on these bases and has therefore waived these arguments. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 6, 119 P.3d 467, 470-71 (App. 2005) (objection on one ground does not preserve another for appeal).

¶11 Fetters also argues the charge on September 18, 2012 for 2.5 hours of work to “draft judgment, notice of lodging and affidavit of attorneys’ fees” is excessive because the documents drafted were “virtually identical to the documents billed for in the earlier application on May 25, 2011.” Again, she did not object to this charge on this basis below, and so has also waived this argument on appeal. *Romero*, 211 Ariz. 200, ¶ 6, 119 P.3d at 470-71.

¶12 Fetters finally argues the trial court’s award of fees was clearly erroneous because its ruling “did not even address any of the issues raised in Fetters’[s] objections to the blatant overbilling by [Nava]’s attorney.” First, by awarding the fees Nava requested, the court implicitly rejected Fetters’s objections. *See Berryhill v. Moore*, 180 Ariz. 77, 82, 881 P.2d 1182, 1187 (App. 1994) (we presume trial court found every fact necessary to support judgment).

¶13 Second, based on the record available, Fetters’s objections were not well founded. The first objection she raised below claimed “the sole issue before the court was the determination of the fair market value of the property” and therefore any fees unrelated to that hearing, including preparation for the hearing, were improper. But it is plain that the trial court considered a variety of other issues, including multiple motions for summary judgment on the complaint and counterclaims. Accordingly, the court did not abuse its discretion in disregarding this objection. *See Hale*, 192 Ariz. 111, ¶ 20, 961 P.2d at 1065.

¶14 Her only other objection was a different challenge to the September 18, 2012 fee, which she argued was excessive because the documents were “incredibly brief and should not have taken [Nava’s counsel] such a significant amount of time to complete,” asserting it was “implausible” to spend that amount of time on documents “with very little substantive material.” However, the attorney fee application included fees for three years of legal work which counsel had to cross-compare with work done for another client to ensure that the amount requested did not conflict with the court’s prior rulings. We cannot say the court abused its discretion in concluding 2.5 hours of work

was reasonable for ensuring an accurate and fair fee request was presented to the court. *See Hale*, 192 Ariz. 111, ¶ 20, 961 P.2d at 1065.

### **Fair Market Value**

¶15 Fetters last argues the court erred in determining the value of the property at issue. We review a trial court’s factual determinations with deference, and we will sustain its findings unless they are “clearly erroneous or unsupported by any credible evidence.” *See Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990).

¶16 The fair market value of real property is what a hypothetical willing seller and buyer would accept as a fair price in an arms-length transaction. *MidFirst Bank v. Chase*, 230 Ariz. 366, ¶ 7, 284 P.3d 877, 879 (App. 2012). A deficiency judgment based on a foreclosure sale is calculated pursuant to A.R.S. § 33-814(A), which requires the judgment to be the amount owed to the beneficiary minus the greater of the fair market value or the sales price of the property.

¶17 Although we do not have the transcript, the minute entry indicates both parties presented expert testimony on the value of the property. The court admitted appraisals by Nava’s expert placing a total value on the property of \$402,100, and an appraisal by Fetters’s expert valuing the property at \$1,259,000. The court also admitted evidence of a credit bid by Nava at the trustee’s sale in the amount of \$1,000,000. Without explanation, the court in its minute entry found the property had a fair market value of \$1,000,000. Because Fetters has not provided a transcript of the hearing as part of our record, we presume that transcript supports the trial court’s finding. *See Baker*,

183 Ariz. at 73, 900 P.2d at 767. We may therefore presume the court's fair market value determination complied with § 33-814(A). If the court rejected Fetters's valuation evidence, the minimum amount it could use to determine the deficiency was the amount of the credit bid, or \$1,000,000. That appears to be exactly what the court did here. Accordingly, we cannot say the court abused its discretion.

### **Attorney Fees on Appeal**

¶18 Fetters requests attorney fees and taxable costs on appeal, but she was not successful in this appeal. We deny her request for an award of fees and costs on appeal. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 28, 99 P.3d 1030, 1037 (App. 2004). Nava also requests reasonable attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01, Rule 21, Ariz. R. Civ. App. P., and paragraphs three and eleven of the deed of trust. We award Nava his reasonable attorney fees and costs pursuant to § 12-341.01 and the deed of trust, upon his compliance with Rule 21.

### **Conclusion**

¶19 For the foregoing reasons, we affirm the judgment of the trial court.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller

MICHAEL MILLER, Judge